IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 09-0682

JEANETTE DIAZ, LEAH HOFFMANN-BERNHARDT, RACHEL LAUDON, individually and on behalf of others similarly situated,

Plaintiffs/Appellants,

vs.

BLUE CROSS AND BLUE SHIELD OF MONTANA, NEW WEST HEALTH SERVICES, MONTANA COMPREHENSIVE HEALTH ASSOCIATION, STATE OF MONTANA, AND JOHN DOES 1-100,

Defendants/Appellees.

Lower Court Cause
No. BDV 2008-956
Honorable Jeffrey Sherlock

APPELLANTS' OPENING BRIEF

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I. ISSUES

1. Should the class have been certified pursuant to Mont. R. Civ. P. 23(b)(2) based upon this Court's ruling in *Ferguson v. Safeco*, 2008 MT 109?

2. Alternatively, should the Appellants have been given an opportunity to seek class certification under Mont. R. Civ. P. 23(b)(3) as occurred in *Burton v. Mountain West Farm Bureau*, 214 F.R.D. 598 (D. Mont. 2003)?

3. Did the District Court err by delving into the merits instead of confining the inquiry to Rule 23?

4. Were the District Court's findings regarding the merits incorrect?

II. STATEMENT OF CASE

The Respondents provided health insurance to Appellants Jeannette Diaz and Leah Hoffmann-Bernhardt. They reduced the Appellants' health care benefits claiming the Appellants' medical bills were the obligation of tortfeasors, who had negligently injured the Appellants in automobile accidents, rather than the Respondents' obligation. They did not make any determination of whether the Appellants had been "made whole" for all tort damages before reducing benefits.

The Appellants filed suit alleging the Respondents had violated their "made whole" rights by reducing their benefits without making a "made whole"

determination. They also requested class certification of all similarly situated insureds who had their compensation reduced in violation of Montana's "made whole" laws. They requested all insureds be restored to the full benefits they would have received had the Respondents not violated their "made whole" rights.

The District Court issued an order denying the Appellants' motion to certify the class. This appeal followed pursuant to Mont. R. App. Civ. P. 6 (3)(d), which allows direct appeals "from an order . . . refusing to permit an action to be maintained as a class action."

III. STATEMENT OF FACTS

A. BACKGROUND.

The Respondent State of Montana insures its employees and their dependents for health care costs. Respondent Blue Cross Blue Shield of Montana ["BCBSMT"] or Respondent New West Health Services ["New West"] administers the State's insurance plans at issue, here. BCBSMT and New West also insure people directly through their own plans utilizing procedures that make their actions relevant to the issues, here.

Section 2-18-902, MCA prohibits the State from exercising subrogation unless and until those who it insures are made whole. Section 33-30-1102, MCA

imposes the same prohibition on BCBSMT and New West. The prohibition is identically stated in the two statutes:

> "The insurer's right of subrogation . . . may not be enforced until the injured insured has been fully compensated for the insured's injuries."

The Appellants filed this lawsuit alleging the Respondents had violated this statutory language and corresponding public policy and Constitutional principles, which prohibit subrogation unless the injured person has been fully compensated ("made whole") by the person who injured her (i.e., a tortfeasor). *See* Appendix 1, Complaint, DN 1. "The District Court must take the allegations of plaintiffs as true and any doubts as to certification should be resolved in favor of the plaintiffs." *Thompson v. Community Ins. Co.*, 213 F.R.D. 284, 291 (D. Ohio 2002).

Appellant Jeanette Diaz was a state employee insured for health care costs under a State plan administered by BCBSMT. She was injured in an automobile accident caused by the negligence of a tortfeasor who had liability insurance coverage. Before she settled with the tortfeasor, the State, through its BCBSMT administrator, commenced reducing her health insurance benefits because the tortfeasor's insurance company was paying the medical costs as part of tort damages. When Ms. Diaz eventually reached a settlement with the tortfeasor, her attorney fees and costs further reduced her compensation. Her attorney informed

the State and BCBSMT that the reductions they had made to health insurance benefits violated Montana's "made whole" laws. The Respondents, however, refused to reimburse Ms. Diaz for the reduction in her benefits. *See* Appendix 1, Complaint, pp. 5-6; Affidavit of Attorney Hunt, DN 51, pp. 1-3.

Appellant Leah Hoffmann-Bernhardt was insured under a State plan, which was administered by New West. She was also injured in an automobile accident caused by a third party tortfeasor who carried liability coverage. Her health insurance benefits were also reduced by the State through its New West administrator on the ground that a tortfeasor was responsible for medical costs as part of tort damages. When she settled with the tortfeasor, her attorney fees and costs further reduced her net recovery. Her attorney notified the State and New West that reductions in health insurance coverage violated her "made whole" rights. The Respondents refused to reimburse Ms. Hoffmann-Bernhardt. Appendix 1, Complaint, pp. 7-8; Hunt Affidavit, pp. 3-6.

On October 23, 2008, the Appellants filed suit alleging:

> "Defendants' [reductions in benefits] violate Montana constitutional, statutory law, common law, and established public policy. An injured 'insured is entitled to be made whole for his entire loss and any costs of recovery, including attorney's fees, before the insurer can assert its right of legal subrogation against the insured or the tortfeasor.' *Skauge v. Mountain States Tel. & Tel. Co.*, 172 Mont. 521, 565 P.2d

623 (1977).'" . . . The defendants have a duty to determine whether their insureds are made whole before they "may collect subrogation."

Appendix 1, Complaint, pp. 3-4. For relief, the Appellants requested a declaratory judgment that the Respondents had violated Montana's "made whole" laws by reducing coverage and an "order requiring the defendants to calculate the amount due to [the Appellants] and make payment accordingly." *Id.* at 6, 8.

The Appellants also alleged the Respondents had "programmatically" violated the "made whole" rights of hundreds of other insureds in a similar manner and therefore, "requested that the Appellants be designated as representative plaintiffs in a class action certified under Montana Rule of Civil Procedure 23." Appendix 1, Complaint, pp. 10 *et. seq.* The class would include all persons similarly situated who had their health insurance benefits reduced illegally in violation of the "made whole" rules and statutes. The class was intended to include all persons similarly situated both under State plans and under other plans administered or operated and underwritten by BCBSMT and New West in Montana. *Id.*

The limited discovery conducted prior to the certification hearing indicates the State has been programatically and systematically violating the made whole rights of its insureds. Specifically, the State continues to utilize an exclusion

which is functionally equivalent to exclusions held to be violations of the "made whole" laws in *Blue Cross-Blue Shield v. State Auditor*, 2009 MT 318. The exclusions similarly violate the language of § 33-30-1102, *supra*, which prohibits subrogation unless the "insured has been fully compensated." *Id.* at ¶ 17. (As set forth above, the statute which limits the State's right to subrogation, § 2-18-902, *supra*, contains identical language.) Exclusions of this nature effectively allow [insureds] to exercise subrogation before paying anything to [their] insured," which is contrary to the "made whole" laws. *Id.* at ¶¶ 18-19.

The State admitted at the certification hearing that it continues to employ such an exclusion -- despite this Court's ruling in *State Auditor, supra*. Tr. 200-201. The exclusion states the plan will "not cover . . . [medical] expenses . . . paid under an automobile insurance policy, a premises liability policy or other liability policy." DN 55, ¶ 12. Presumably, all of the Respondents have employed similar exclusions for a number of years. Therefore, if the Appellants are correct on the merits, then there has been a programmatic and systematic practice which requires compensation to those deprived of "made whole" rights in the past and a Court order to enjoin the practice into the future.

Therefore, the relief requested for the class was: (1) a declaratory ruling that the Respondents programmatic practices violated the "made whole" laws; and (2)

an order requiring the Respondents to calculate the "amounts wrongfully withheld" and pay it to the class members plus interest. The Court was also requested to enjoin all future violations of the "made whole" laws. There were alternative requests for relief and some additional items of relief, which are not germane to the certification issue. *See* Appendix 1, Complaint, pp. 14-15.

Montana Rule of Civil Procedure 23(c)(1) states, "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it should be maintained." Under this Rule, the Appellants moved for class certification in March 2009. Over the Appellants' objections, the Court did not hold a certification hearing until seven months later. All of the Respondents opposed certification.

At the hearing, the Court allowed the Respondents to conduct an evidentiary hearing over the Appellants' objection. In the briefs and at the hearing, the Appellants argued certification was appropriate under Mont. R. Civ. P. 23(b)(2), since the Montana Supreme Court had so held in the similar "made whole" dispute presented in *Ferguson v. Safeco, supra. E.g.,* DN 39, p. 21; Tr. 26-27, 41. The Appellants had alternatively pled in their Complaint that certification under Rule 23(b)(3) would also be feasible. Appendix 1, Count Four, ¶ 3, p. 11.

Several other motions were pending at the time of the certification hearing. The Appellants had moved to amend the Complaint to include tort and punitive damage claims against BCBSMT and New West, but not against the State. *See* DN 16 and 17. The parties filed cross-motions for summary judgment on the individual claims and made various other motions. As set forth in its Order, the District Court never ruled on any of these motions. *See* Appendix 2, District Court's Order, pp. 1-2, DN 107. This appeal, therefore, is limited to the issue of class certification.

Discovery has been incomplete. The parties have exchanged written discovery requests primarily aimed at the certification issue. Respondent New West took Leah Hoffmann-Bernhardt's deposition. Pending certification, the Appellants have not conducted substantial discovery into the merits.

There was a third plaintiff, Rachel Laudon, and a third defendant, Montana Comprehensive Health Association (MCHA), which is administered by BCBSMT. Ms. Laudon's representative and class claims were similar to the Appellants'. MCHA and BCBSMT offered Ms. Laudon a settlement which she accepted; her claims were dismissed and she and MCHA are no longer parties to this suit or the appeal.

On December 16, 2009, approximately 14 months after suit was filed, the District Court finally ruled on certification, denying the Appellants' motion. Appendix 2. The details of the Court's Order are discussed as part of the Appellants' argument later in this brief.

B. RELATED LITIGATION.

There are two related lawsuits, one in another state district court and the other in federal district court. Both were filed after this case. In one of them, BCBSMT twice stipulated that class certification is appropriate, while at the same time continuing to deny that class certification is appropriate here.

First, after the Appellants filed this lawsuit, a similar class action suit entitled *Neary, et al. v. Blue Cross and Blue Shield of Montana, et. al.* was filed in Montana's Second Judicial District by a separate attorney. It was removed to federal court by BCBSMT and then remanded back to state court.[1] The basic allegation in *Neary* is that BCBSMT violated Montana's "made whole laws" by excluding health insurance benefits when its insureds had been injured by third party tortfeasors. *See* Appendix 3. The Appellants, therefore, believe the *Neary* case overlaps their case.

[1] The current state designation for *Neary et. al* is Cause No. DV-08-553 and DV-09-401. It was designated Cause No. CV-09-08-BU-RFC-CSO while in federal court.

As stated above, BCBSMT has taken a different position in *Neary*. It has stipulated to class certification, contrary to its opposition to certification in this case. It did this twice: once while the case was in federal court and now after remand to state court. *See* Appendices 4, 5.[2] (BCBSMT and Neary's attorney agreed to certification during settlement negotiations). In the *Neary* pleadings, BCBSMT has taken the position that its concessions regarding certification cannot be considered judicial admissions. *See e.g.*, Appendix 6, p. 5, ¶ 7. The Appellants disagree and contend all or part of these concessions constitute judicial admissions. For instance, factual admissions cannot now be contradicted. At a minimum, BCBSMT's positions in the related cases limit the weight to be given to BCBSMT's argument, here, that certification is not possible. The District Court in *Neary* has not approved the settlement; there has been no "fairness" hearing on its terms, and no class representative has been appointed. As indicted below, the validity of the proposed settlement is in dispute.

The second related case is *Budd/Pallister v. Blue Cross Blue Shield of Montana*, Cause No. CV-09-62-H-CCL (D. Mont.). Similar to this case, Budd and Pallister contend BCBSMT deprived them of full health care benefits in violation

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[2] The applicable portions of the federal pleadings and subsequent state pleadings are being provided in the appendix on the ground that this Court has authority to take judicial notice of "records of any court of this state or of any court of record of the United States." Mont. R. Evid. 201(b)(6).

of Montana's "made whole" laws. BCBSMT removed Budd and Pallister to federal court on the ground that they present federal issues under ERISA. Various motions are pending, including a motion for class certification. The Appellants' attorneys also represent Budd and Pallister. *See* Appendix 7.

Budd, Pallister and Diaz have moved to intervene in *Neary*, which is now filed in the Second Judicial District. They contend some of the putative class members in their suits are also in the *Neary* putative class. They contend intervention is appropriate because their interests and the interests of the putative class are not being adequately protected in settlement negotiations between BCBSMT and Neary's attorney. Recently, their motion to intervene has been denied and they are currently considering a direct appeal to this Court. Appendices 8, 10.

The outcomes in these related cases do not decrease the necessity for a proper ruling on certification here. Among other things, the State's plans are not specifically part of the related cases.

IV. STANDARD OF REVIEW

The abuse of discretion standard generally applies to class certification decisions. *Sieglock v. Burlington Northern Ry. Co.*, 2003 MT 355, ¶ 8. However, if the District Court's certification decision is predicated on an error of

law, it is a "*per se* abuse of discretion" and is afforded "no deference." *Yokoyama v. Midland Nat. Life Ins. Co.,* 594 F.3d 1087, 1091 (9 Cir. 2010); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9 Cir. 2001).

V. ARGUMENT SUMMARY

In the *Neary* case, BCBSMT has admitted at least 3,585 Montana insureds have been deprived of benefits through exclusions held to be in violation of the "made whole" laws in *State Auditor, supra. See* Appendix 9.[3] As indicated above, the State admits it is employing the same type of exclusion. Thus, it is conceivable that over a thousand of the State's insureds have been similarly deprived of benefits and that many future insureds will be similarly deprived, unless a Court enjoins the State from continuing to employ its exclusions.

Under these circumstances, the Appellants submit a class action is the only efficient and effective method of correcting this programmatic violation of the "made whole" laws. As stated in *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 155, 102 S. Ct. 2364, 2369 (1982), "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially

[3] Appendix 9 is Exhibit A to a Brief jointly filed by the parties in *Neary* on February 5, 2010 moving for preliminary certification and settlement approval. The document and its exhibits exceed 50 pages and therefore, only the pertinent portion is provided here. It apparently was drafted by BCBSMT.

affecting every [class member] to be litigated in an economical fashion under Rule 23." Thousands of separate individual suits in separate courts is inefficient. Insureds having relatively small claims individually would not be able to afford representation.

The Appellants patterned their certification briefs and argument on the case of *Ferguson v. Safeco*, *supra,* since this Court had held in that case that a class should be certified under Rule 23(b)(2), *supra*, where the defendant had failed to perform a "made whole" analysis before taking subrogation. Therefore, the Appellants requested that the District Court base its decision upon the certification granted in *Ferguson.* DN 39, p. 21; Tr. 41. Nevertheless, the District Court refused to certify the class, making the same errors as those made by the District Court in *Ferguson.*

In their Complaint, the Appellants pled the class could also be certified under Mont. R. Civ. P. 23(b)(3) in the event that the Court denied certification under Rule 23(b)(2), *supra.* However, in ruling against the Appellants under Rule 23(b)(2), the District Court made rulings which have foreclosed the Appellants from seeking certification under this alternative subsection. Specifically, the District Court held the case lacked a "predominate" issue, which is a prerequisite of Rule 23(b)(3) certification. The District Court erred. A predominant issue,

which applies equally to the Appellants and to every member of the class, is whether the Respondents violated Montana's "made whole" laws by failing to make a "made whole" determination before reducing benefits. Thus, at the very least, this case should be remanded so that the Appellants can pursue this alternative ground for certification. *See Burton v. Mountain West Farm Bureau Mut. Ins. Co.*, 214 F.R.D. 598, 613 (D. Mont. 2003).

In ruling against certification, the District Court also addressed the merits of the Appellants' claims and the Respondents' defenses. This was error. There is "nothing in either the language or history of Rule 23 that gives the court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class-action. . . . The question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle,* 417 U.S. 156, 177-178 (1974). Nevertheless, if this Court deems it appropriate to address the merits, the District Court's findings thereon lack merit.

Each of these subject matters is addressed separately below.

VI. ARGUMENT

A. CERTIFICATION SHOULD HAVE BEEN GRANTED UNDER *FERGUSON*.

As discussed above, the Appellants patterned their Complaint and class action on *Ferguson, supra*, and were asking for identical relief. This would have allowed certification under Mont. R. Civ. P. 23(b)(2).

Ferguson had been involved in an automobile collision negligently caused by a third party. Her own auto insurer, Safeco, "subrogated against the tortfeasor's insurance carrier, recovering some of the amounts it [had] paid for property damages." Ferguson alleged "she was not made whole prior to Safeco subrogating against her recovery." Identical to the Respondents here, Safeco did not make "a determination as to whether Ferguson had been made whole" before commencing subrogation. *Id.* at ¶¶ 4-5. Ferguson sought both contract and tort damages, including punitive damages. *Id.* at ¶ 6. Relevant to her motion for class certification, she requested:

> A judicial declaration that Safeco has breached its insurance contract and adjustment duties by a programmatic assertion of subrogation without first investigating and determining whether the insureds have received their "made whole" rights. [Her] "prayer for class-wide declaratory relief [was] that the court issue an injunctive order compelling the return of subrogation amounts until such time as adjustments under the "made whole" standard have been completed by Safeco.

Id. at ¶ 33.

The District Court refused to certify the class, reasoning Ferguson had failed to satisfy either Mont. R. Civ. P. 23(a) or (b)(3):

> Specifically, the court determined that Ferguson failed to identify an issue of law or fact common to the members of the proposed class that *predominates* over any questions affecting only individual members. Thus, the court determined that Ferguson failed to meet the requirements of Mont. R. Civ. P. 23(b)(3). The District Court also concluded that this action would require *fact-specific determinations of "made-whole" entitlements*, thus it was not suitable for a class action."

Id. at ¶¶ 12-14 (emphasis added).

This Court reversed, holding the "District Court erred in concluding Ferguson did not meet the requirements for class certification under Rules 23(a) and (b)." *Ferguson*, ¶¶ 41-42. It was error to conclude that "predominance" is required for class certification" because "predominance" does not apply to Rule 23(b)(2) classes. *Id.* at ¶ 38. Moreover, there was no requirement for "fact-specific determination for made whole entitlements" because Ferguson did "not seek to adjudicate any individual 'made-whole' entitlements." She was only requesting that amounts obtained from the tortfeasor in violation of the "made whole" laws be paid to the class members "until such time as adjustments under

the "made whole" standard have been completed by Safeco." *Ferguson*, ¶¶ 33-37. Thus, after the class action was over, Safeco would still have a right to make "made whole" analyses and if they showed any class member had been "made whole," subrogation could be enforced (This, of course, would have been no more complicated than what Safeco was legally required to do in the first place.).

The District Court, here, has made the same errors as the District Court in *Ferguson*. It mistakenly applied the Rule 23(b)(3) "predominance" criterion when the Appellants were arguing for certification under Rule 23(b)(2)-- as was Ferguson. The Court also mistakenly concluded that Rule 23(b)(2) relief would require "individualized assessments" to determine whether each class member has been "made whole" when the Appellants' relief does not require factual determinations of "made whole" entitlements. As in *Ferguson*, *supra* at ¶ 33, the class action would be over as soon as the class members were paid all amounts reduced from coverage "until such time as adjustments under the 'made whole' standard have been completed by" the Respondents (This, of course, is what the Respondents were legally required to do in the first place, if they wanted subrogation. *See e.g.*, §2-18-902 and §33-30-1102, *supra.*).

The District Court's erroneous conclusion that class certification would mean "individual assessments" is discussed in a variety of ways throughout its

Order. The Court was concerned "separate mini-trials" would be needed whenever there existed a chance of "double recovery" or the insured settled for less than policy limits. It believed a host of factual issues might have to be resolved. *Id.* at 7, 9, 13, 16. As shown above, however, under Rule 23(b)(2), the class action will be over as soon as the Respondents pay back all amounts illegally reduced from coverage or taken directly from the insured or tortfeasor. Factual issues could only occur after the Respondents performed "made whole" analyses, which would take place after the class action was completed.

An alternative interpretation of *Ferguson, supra*, is that it does not categorically prohibit the Respondents from making a "made whole" analysis as part of the class action suit. Quoting from *Lebrilla v. Farmers Group, Inc.*, 119 Cal. App. 4th 1070, 16 Cal. Rptr. 3d 25 (2004), this Court observed that even if the remedy involved an "analysis," it would not be for the "court to do." Rather:

> It will be left to [the insurance company] to adjust insurance claims in accordance with claims procedures already in place . . . [and] it will be up to [the insurance company] to ensure that each class member receives the coverage required under the policy. These obligations are fairly placed on [the insurance company] because adjusting claims is squarely within [its] expertise.

Ferguson, ¶ 35. Applying this to systematic violations of "made whole" laws as existed in *Ferguson*, this Court continued:

> As in *Lebrilla*, the instant case does not require the Court to analyze any individual insured's amount of loss or recovery. Rather, the relief sought by Ferguson on behalf of the class is an order compelling Safeco to properly perform its statutory adjustment duties.

Id. at ¶ 36.

Applied to *Diaz* and *Hoffmann-Bernhardt,* "adjusting claims is squarely within [Respondents'] expertise." Consistent with the above, "an order compelling" [the Respondents] to properly perform [their] statutory adjustment duties," including a "made whole" analysis, would require the Respondents to do nothing more complex than that which they were already required to do by law. It would actually benefit the Respondents, since it would allow them to avoid multiple suits. Nevertheless, given the Respondents' contention that ordering "made whole" analyses would create "mini trials," *Ferguson, supra*, should be construed narrowly, requiring the Respondents to pay every class member in full without the "made whole" analysis being part of the class action suit.

Rule 23 is flexible enough to accommodate both interpretations of *Ferguson, supra.* Assuming, *arguendo*, the Respondents would be allowed to make a "made whole" determination, Rule 23(c)(4) expressly recognizes an "action may be brought or maintained as a class action with respect to particular issues." *1 Newberg on Class Actions*, §2:4 recognizes, for instance, that a class

action can be brought on common liability issues and individualized damage assessments, if necessary, can be made in separate lawsuits. According to the comments to Rule 23(c)(4), the Rule exists to resolve situations where individualized factual issues might complicate class management. *See Newberg, supra.* Thus, the *Diaz* class action -- like the *Ferguson* class action -- can terminate as soon as the Respondents pay the class members all that was illegally reduced from coverage or taken from the tortfeasor or insured. Individual factual "made whole" analyses -- if legally allowed at this juncture -- can occur after the class action has been decertified.

For these reasons, this Court should reverse and remand the case, holding certification should have been granted under Rule 23(b)(2) pursuant to *Ferguson.*

B. APPLICATION OF THE RULE 23 PREREQUISITES SHOW CLASS CERTIFICATION IS APPROPRIATE.

As shown below, the Appellants have satisfied all Rule 23 prerequisites for certification under Rule 23(b)(2) in a fashion similar to that in *Ferguson.*

1. Rule 23(a)(1) Numerosity Prerequisite. "Plaintiffs must establish that the "class is so numerous that joinder of all members is impracticable." Rule 23(a)(1). The District Court did not challenge the Appellants' position on this

prerequisite and therefore, it need not be addressed on appeal. *See* Court's Order, p. 16.

2. Rule 23(a)(2) Commonality Prerequisite. Class "litigation must present a common issue of law or fact. [This Court has] previously held that, regardless of differences among class members, this element is met if a single issue is common to all." *Ferguson, supra* at ¶ 16. Furthermore:

> [t]he commonality requirement is not a stringent threshold and does not impose an unwieldy burden on plaintiffs. In fact, as a general rule, all that is necessary to satisfy Rule 23(a)(2) is an allegation of a standardized, uniform course of conduct by defendants affecting plaintiffs. Plaintiffs need only show a "common nucleus of operative facts" to satisfy Rule 23(a)(2).

Ferguson, ¶ 26. In *Ferguson*, this Court stated *Powers v. Government Employees Ins. Co.*, 192 F.R.D. 313, 317, 320 (S.D. Fla. 1998), another "made whole" class action, was "directly on point" when it held that a common issue exists if the insured has a practice of not applying the "made whole" laws. *Id.* at ¶ 27. Therefore, *Ferguson* satisfied commonality because there existed a "common fact issue of whether Safeco has programmatically breached" the "made whole" laws by failing to make a "made whole" determination before taking subrogation. *Id* at ¶ 28.

For the same reasons, the Appellants, here, have shown a common issue by alleging the Respondents "have a duty to determine whether their insureds are made whole before they "may collect subrogation." Complaint, p. 4. They allege "The issue of the defendants' programmatic failure to pay insurance benefits on behalf of class members is a question of law and/or fact common to all class members." Complaint, p. 11, Count 4, ¶ 2(2).

3. Rule 23(a)(3) Typicality Prerequisite. "Rule 23(a)(3)'s typicality requirement demands that the representative be a member of the class and share at least a common element of fact or law with the class. . . . Like the test for commonality, the test for typicality is not demanding and the interests and claims of the various plaintiffs need not be identical." *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 (6 Cir. 1997). Moreover, "the commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether, under the particular circumstances, maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements, therefore, also tend to merge with the adequacy-of-representation requirement." *General Tele. Co. of Southwest v. Falcon, supra* at 158. Typicality is satisfied where both the

representative and class claims are "based on the same legal theory." *Powers, supra.*

It is apparent, here, that the Appellants' individual claims arise from the same legal theory and are therefore, typical of the class claims. The individual claims allege the Respondents violated "made whole" laws by, among other things, reducing coverage without first making a "made whole" determination. The Appellants and every single class member had their available recovery from the tortfeasor reduced by the Respondents' programmatic practice of reducing coverage or taking subrogation without first determining whether the insureds had been "made whole." The Appellants' representative claims are "squarely aligned in interest" with the class providing assurance that in protecting their interests, the Appellants necessarily will be protecting the class. This is the reason for the typicality prerequisite. *1 Newberg, supra* at §3:1, p. 212.

4. Rule 24(a)(4) Representation Prerequisite. This requires the "representative parties will fairly and adequately protect the interests of the class." Rule 23(a)(4). The District Court did not contend the prerequisite had not been satisfied. All three attorneys representing the Appellants are attorneys in good standing who cumulatively have decades of experience in insurance matters and experience or education involving class action litigation.

Thus, for the same basic reasons observed in *Ferguson, supra*, all four prerequisites of Rule 23(a) are clearly satisfied.

5. Rule 23(b)(2) Is Satisfied. For the reasons set forth in *Ferguson, supra*, and discussed in Subpart VI, A of this brief, *supra*, Rule 23(b)(2) provides a manageable remedy without having to consider "predominance" or individual factual determinations of "made whole" entitlements.

6. Other Considerations. The weight of BCBSMT's arguments that certification is inappropriate is diminished by its contrary position in *Neary, supra*, that certification is appropriate.

C. THE CASE CAN ALSO BE CERTIFIED UNDER RULE 23(b)(3).

Assuming *Ferguson* could be distinguished, the case would still be subject to certification under Rule 23(b)(3), which allows certification when factual issues are presented. Appellants alternatively pled certification is appropriate under Rule 23(b)(3). Appendix 1, p. 11, Count Four, ¶ 3. The District Court's finding that the case lacked a "predominate" issue, however, effectively ended the Appellants' ability to seek certification under this subsection.

A similar insurance dispute was considered in *Burton v. Mountain West Farm Bureau Mut. Ins. Co.*, 214 F.R.D. 598, 613 (D. Mont. 2003). The representative plaintiff alleged the defendant had failed to stack medical payment

insurance in violation of Montana anti-stacking laws. Among other things, the plaintiff alleged the defendant's conduct constituted insurance bad faith and supported a punitive damage claim. Certification was sought solely under Rule 23(b)(2).

The District Court held "money damages are the primary component of relief sought, [and therefore] certification under Rule 23(b)(2), without notification and opt-out provisions, would be improper." However:

> Courts have three options in such cases. [citing case] First, the Court can certify the class under Rule 23(b)(3); second, the Court can divide certification between Rule 23(b)(2) for the portions addressing equitable relief and Rule 23(b)(3) for the portions addressing damages; finally, the Court can certify the class under Rule 23(b)(2) for both monetary and equitable remedies but exercise plenary authority under Rule 23(d)(2) and Rule 23(d)(5) to provide all class members with personal notice and an opportunity to opt out.

Id. at 611-612. Given this situation, the Court decided to certify the class under Rule 23(b)(3).

There are two additional requirements under (b)(3). First, there has to be one or more "predominate" issues. Predominance exists if "one or more common issues will help achieve judicial economy." Predominance was satisfied because the "most significant aspect of this case [was] whether Mountain West denied stacking benefits to its insureds, and this question is common to all." *Id.*

For the same basic reason, "predominance" also exists in this *Diaz* case. The "most significant aspect" is whether the Respondents' reduction in benefits without conducting a "made whole" analysis violates Montana law "and this question is common to all."

The second additional prerequisite under Rule 23(b)(3) is whether a class action is the superior method for resolving the dispute. In *Burton, supra* , it was because:

> [It was] unlikely that many individuals would choose to opt out of the class and pursue a claim individually. Thus, the class will likely represent a majority of potential members. Likewise, this litigation has progressed sufficiently that it would be inefficient to not certify the class. The Court is not aware of any individual claims of potential class members, nor should identification of the putative class, which is comprised of Montana insureds, be difficult. Finally, notification and management of the class should not deter class certification.

Id. at 612.

The same basic reasoning is applicable in this *Diaz* case. It is unlikely that many individuals will opt out, because without class certification, most will remain uncompensated due either to the small size of their claims or their lack of knowledge that the Respondents violated their "made whole" rights. The suit "has progressed sufficiently that it would be inefficient" to do otherwise. Despite the Appellants' request for an early hearing on certification, the District Court did not

hold a hearing until ten months after suit was filed and did not render a decision for over a year afterwards. In the meantime, considerable time and effort were expended with several motions currently pending and at least some discovery was performed. This *Diaz* case is the first class action filed in Montana on this issue and the statute of limitations for putative class members is preserved so long as certification occurs. Therefore, the superiority requirement is satisfied.

In summary on this point, *Ferguson, supra*, shows that "made whole" disputes can be resolved under Rule 23(b)(2). *Burton, supra*, is somewhat at odds with *Ferguson* regarding Rule 23(b)(2) certification, but demonstrates the certification inquiry should not end, assuming, *arguendo*, Rule 23(b)(2) is only partially applicable. The Court has the option of breaking up the issues, certifying some under Rule 23(b)(2) and some under Rule 23(b)(3), or certifying all of them under Rule 23(b)(3). *Id.* The District Court in this *Diaz* case, however, has prevented a Rule 23(b)(3) analysis from going forward by ruling "predominance" and "superiority" do not exist. Since subsequent amendment of the Complaint or additional discovery could show Rule 23(b)(3) needs to be considered for at least a portion of the case, the District Court's rulings on these issues should be addressed. The Appellants pled Rule 23(b)(3) in the alternative and therefore, should be allowed to assert it if necessary.

D. THE DISTRICT COURT'S OTHER CERTIFICATION RULINGS.

The District Court made erroneous rulings on related certification issues.

1. The Class Definition is Adequate. The District Court erred in redefining the class and holding the Appellants "failed in narrowly defining their class." *See* Appendix 2, Order, p. 6.

First, at this stage of the proceedings, there is no need for a precise class definition. As explained in *1 Newberg, supra* at §2:4, p. 74:

> [I]t is reasonable to conclude that class actions may be maintained whenever a class meets the Rule 23 prerequisites. There is no special rule requiring the existence of a "class" unless, of course, one construes the words by definition to mean as defined by Rule 23. This additional exercise is not very helpful. Parties and the court should properly focus on Rule 23 criteria rather than on any such initial inquiry.

Second, it is improper for the District Court to redefine the class in a manner which excludes putative class members. *MacDonald v. Washington*, 261 Mont. 392, 398-399, 862 P.2d 1150 (1993). Here, the District Court redefined the class to include only insureds who were deprived benefits through the Respondents' written plan exclusions. This definition would allow the Respondents to avoid their "made whole" obligations to insureds who they deprived of benefits through other methods without first making a "made whole" determination. (For instance, the District Court's description is limited to

"automobile liability insurance, but reductions from coverage are also subject to "made whole" laws for other types of tortfeasor liability coverages or even where the tortfeasor is self insured.)

2. The Proposed Amended Complaint Does Not Defeat Certification.

Shortly after suit was commenced, the Appellants moved to amend their Complaint primarily to include tort and punitive damage claims against BCBSMT and New West, but not against the State. The District Court never ruled on the motion and therefore, the proposed amended claims were not before the Court for purposes of class certification. Because of this procedural status, the certification request before the Court was limited to the initial Complaint, which contained no tort or punitive damage allegations. *See e.g.*, Tr. 46-47.

Nevertheless, in its Order, the District Court decided to consider the claims in the proposed amended Complaint– even though it had never made a ruling on them. Order, pp. 13-14. It is not procedurally possible to consider the contents of an amended Complaint before a motion to amend has even been granted. At any rate, class actions are frequently certified despite the presence of tort and punitive damage claims. For instance, both *Ferguson, supra*, and *Burton, supra*, were certified despite the existence of tort and punitive damage claims, which are virtually identical to those set forth in the *Diaz* proposed amended Complaint.

Once the initial Complaint is class certified and the motion to amend has been decided, the District Court and the parties will then have the opportunity to determine what effect, if any, the new claims will have on the class. As stated in Rule 23 (c)(1) and (2), a class "may be altered or amended before the decision on the merits" and "can be certified as to some issues and not others." Thus, if the claims in the amended Complaint interfere with the already certified class, the new claims need not be certified or can be certified separately through Rule 23(b)(3). *See Burton, supra.* Their presence, however, is not a basis for failing to certify the claims in the original Complaint. *See 1 Newberg, supra* at §2:4, pp. 71-72 (noting that the rules of the advisory committee to Rule 23 (c) explain that class actions for tort claims are authorized and if necessary, "members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.").

E. THE DISTRICT COURT SHOULD NOT HAVE ADDRESSED THE MERITS.

Although some limited consideration of the merits may be appropriate, the District Court, here, delved deeply into the merits contrary to *Eisen, supra*, where the United States Supreme Court held:

> "We find nothing in either the language or history of Rule 23 that gives the court any authority to conduct a preliminary inquiry into the

> merits of a suit in order to determine whether it may be maintained as a class-action. . . . The question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

417 U.S. *supra* at 177-178. "*Eisen* applies generally whenever one travels astray to determine the propriety of a class-action . . . by any test independent of the requirements set forth in Rule 23 itself."[4] *1 Newberg, supra*, §2:2, p. 54.

The findings which erroneously address the merits are set forth below in the event that this Court determines they should be considered on this appeal.

1. Montana's Made Whole Laws. The District Court's findings on the merits should be considered in light of the long line of cases and the statutes which define Montana's "made whole" laws.

In Montana, subrogation is limited by Constitutional principles, case law and statutes. As observed in *Oberson v. Federated Mut.*, 2005 MT 329, ¶ 10, "Montana's firm public policy disallowing subrogation prior to full recovery by damaged parties is embodied in Article II, § 16 of Montana's Constitution, and has been applied repeatedly by this Court." The "made whole" laws have been codified by the legislature and applied to the State's plans by § 2-18-902, MCA

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[4] *Newberg* is referring to actions brought in federal courts, but the same rule should apply to state actions since the 1966 version of Fed.R.Civ.P. 23 was under consideration and its language is identical to Montana's Rule 23.

which states that subrogation "may not be enforced until the injured insured has been fully compensated for his injuries." Through identical language, the "made whole" laws apply to private insurance carriers under § 33-30-1102, MCA. Recently in *Blue Cross Blue Shield v. Montana State Auditor*, *supra* at ¶ 18, this Court summarized this law:

> Montana public policy requires that an insured must be totally reimbursed for all losses including costs and attorney fees incurred in recovering those losses, ***before*** the insurer can exercise ***any right of subrogation, whatever an insurance policy may provide to the contrary***. *Swanson v. Hartford Ins. Co.*, 2002 MT 81, ¶ 28, 309 Mont. 269, 46 P.3d 584; *Oberson v. Federated Mut. Ins. Co.*, 2005 MT 329, ¶¶ 14-15, 330 Mont. 1, 126.

(Emphasis added.)

Central to proper application of the "made whole" laws is the requirement for the insurer to *first* make a "made whole" determination before reducing coverage in any way due to the presence of a third party tortfeasor: "[A]n insurer may not collect subrogation *without first determining that its insurer has been made whole*." *Ferguson, supra* at ¶ 17. Applied to the case here, it is undisputed that the Respondents made no "made whole" determination before reducing Ms. Diaz's or Ms. Hoffmann-Bernhardt's benefits. Nor did they make any initial "made whole" determination before reducing the benefits of any putative class

member. As explained previously, this failure is a "predominant" issue in this case which triggers a remedy.

This Court has recognized the "made whole" laws apply to devices employed either before or after the insured resolves her claims with the tortfeasor. Thus, in striking down a contract exclusion in *State Auditor, supra* at ¶ 19, this Court explained:

> The BCBS exclusions effectively allow it to exercise subrogation before paying anything to its insured, contrary to § 33-30-1101, MCA, which allows reimbursement "for benefits paid." The exclusions allow BCBS to avoid any payment of benefits to its insured if the insured is "entitled to receive" benefits from any other auto or premises liability policy, whether the insured actually receives any of those benefits, and whether the insured has been made whole. . . . The BCBS exclusions therefore violate Montana statutory and case law on subrogation.

The Appellants allege the Respondents have programatically employed a variety of devices before and after their insureds have resolved their claims with the tortfeasors to defeat the insureds' "made whole" rights. Chief among them, are written exclusions which require the tortfeasor to pay before health insurance will kick in. *See* page 6, *supra*. This can take the form of encouraging medical providers to bill the tortfeasors first and to refund health insurance benefits whenever the tortfeasor's liability carrier is also paying. The Respondents do not

inform either their insureds nor the health insurers that under Montana law, the health insurer has the legal duty to pay first, rather than *visa versa*. The various devices will be fully developed in discovery once certification takes place.

2. The District Court's View of the Merits Is Incorrect for Two Basic Reasons. The district judge questioned whether the "made whole" laws applied to the State, as opposed to private carriers, such as BCBSMT. There are at least two basic and independent reasons why the "made whole" laws apply to the State.

First, § 2-18-902, MCA states it does. The statute codifies the "made whole" laws stating "subrogation . . . may not be enforced *until* the injured insured has been *fully compensated* for the insured's injuries." (Emphasis added.)

Second, even assuming, *arguendo*, this statutory language did not exist, it would still be unconstitutional to allow an insurer to reduce recovery from the tortfeasor when the injured person had not been "made whole." As stated in *Oberson, supra* at ¶ 14, "This Court has consistently interpreted the language of Article II, § 16 as precluding the subrogation of a *tort award* until the damaged party fully recovers." (Emphasis added).

Application of these two basic legal principles show the District Court's interpretation of the case law is incorrect.

3. The *State Auditor* Case. In *BCBSMT v. State Auditor, supra*, this Court held that BCBSMT exclusions which require the tortfeasor to pay medical bills before health insurance pays violate Montana's "made whole" laws. The District Court questioned whether *State Auditor, supra*, would extend to the State, since public plans are governed under Title 2 of the Montana Codes Annotated, rather than Title 33, which governs private carriers, such as BCBSMT. The fact that the State is governed by a different Title, however, is irrelevant because both private and public plans are governed by identical subrogation statutes, which codify the "made whole" laws:

> "The insurer's right of subrogation . . . may not be enforced until the injured insured has been fully compensated for the insured's injuries."

Section 2-18-902, MCA (State); § 33-30-1102, MCA (private insurers).

Therefore, both private and public entities are subject to the "made whole" laws." Given the fact that the Constitution equally applies to both private and governmental entities and forbids reductions from recovery from the tortfeasor unless the injured person has been made whole, it is appropriate that the legislature included the concept in its statutes.

4. The *Newbury* case. The District Court erroneously relied upon *Newbury v. State Farm Fire & Casualty Co.*, 2008 MT 156, 343 Mont. 279 (2008). *See*

Order, pp. 14-15. However, it is easily distinguished.

Newbury was injured on the job and received workers' compensation benefits. Subsequently he made claims for first-party medical payments coverage under his personal auto liability insurance with State Farm. State Farm paid the difference of $1,175.80 between Newbury's incurred medical expenses and the amount paid under the workers' compensation medical benefit. Newbury claimed State Farm was required to pay the remaining $8,824.20 limits in medical payment coverage, even though his medical bills were completely paid. Newbury did not have a claim against a third party for tort damages.

This Court held that State Farm was only required to pay the difference between the workers' compensation coverage and the actual medical expenses incurred. The Court's rationale can be summed up as follows:

> What Newbury paid valuable consideration for in this case was to have his medical expenses paid and it is undisputed that his medical expenses were paid. To allow Newbury to receive in excess of the total amount of his medical expenses would result in a windfall to Newbury.

Newbury, ¶ 47. The Court further noted the following:

> Montana law expressly relieves insurers of any legal obligation to include in their automobile policies a provision of indemnity against employment-related harm. Section 61-6-103(5), MCA, provides in part: "A motor vehicle liability policy need not insure any liability under any workers' compensation law . . ."

Newbury, ¶ 45.

Newbury is clearly distinguishable. By statute, Newbury's first-party medical payment carrier had a right to exclude workers' compensation benefits. By contrast, the Respondents, here, have a statutory duty to refrain from subrogation unless and until their insureds "have been fully compensated." Moreover, *Newbury* does not involve a dispute between the injured person's first-party insurance carrier and a tortfeasor recovery where the "made whole" laws apply. *See Oberson, supra.*

Newbury was fully compensated for his only damage of medical costs. By contrast, set off and subrogation for medical bills in a tort context can shortchange the injured person's recovery of other types of personal injury damages.

5. The *Thayer* Case. The Order also erroneously indicates insurance provided by the State may be governed by *Thayer v. Uninsured Employer Fund*, 297 Mont. 179, 991 P.2d 447 (1999). Order, p. 15.

Thayer was injured at work. His employer had failed to carry workers' compensation coverage. The statutory Uninsured Employer Fund ("Fund"), therefore, kicked in and paid some of Thayer's workers' compensation benefits. Thayer later recovered damages against both his uninsured employer and against a

third party tortfeasor. This Court held it was proper for the Fund to set off its payments against the recovery from the uninsured employer (the Fund did not attempt to set off the tortfeasor recovery). This Court's reasoning shows *Thayer* is inapplicable.

In *Thayer*, this Court ruled the "made whole" laws were inapplicable because the legislature had granted the Fund a right to a setoff through § 39-71-511, MCA. By contrast, through § 2-18-902, *supra*, the legislature, here, has codified the "made whole" laws.

In *Thayer*, the injured person was a stranger to the Fund. The Fund had no contract with him to provide full benefits; the Fund was not paid premiums and therefore, the Fund was not an insurance company subject to "made whole" laws. By contrast, § 2-18-902, *supra*, explicitly labels the State an "insurer" and the injured person an "insured." The State has a contractual plan with its employees, requiring the payment of benefits. The cost of coverage is taken from the employees' compensation package passed by the legislature and dependents and retirees pay premiums. *See* Tr. 166.

Finally, the "setoff" in *Thayer* was taken from the uninsured employer recovery – not the tortfeasor recovery where the "made whole" laws apply. *See Oberson, supra.*

6. The District Court's Comment on a Factual Issue. The District Court also considered the merits through an affidavit submitted by a State administrator. Order, pp. 12-13. Discovery into the weight, validity and completeness of this affidavit has not yet taken place. Application of *Eisen, supra,* makes it irrelevant to certification under Rule 23, *supra.*

At any rate, the affidavit and the affiant's testimony at the certification hearing indicate the State considers "made whole" rights when its actions are contested by its insureds (primarily if not exclusively the insureds' attorneys). In negotiations with these insureds, the State continues to this day to take the position it can assert an exclusionary clause equivalent to the ones this Court held violated the "made whole" laws in *State Auditor, supra.* When "made whole" disputes are compromised, the insureds are required to sign a "release." *See e.g.,* Tr. 192-214. This hardly supports the conclusion that the State is respecting its insureds' right to be "made whole," which is the point of this lawsuit and request for certification. Full discovery will take place after remand.

VII. CONCLUSION

As *Ferguson*, *Burton*, and the cases cited therein indicate, class actions are routinely certified when an insurance company has systematically engaged in a practice which allegedly violates state law. The issue is not so much whether certification is appropriate, but rather, what subsections or combination of subsections of Rule 23(b) need to be employed in order to resolve the various causes of action. Such is the case here.

Considering insurance disputes in this manner also furthers the objectives underpinning class action litigation. *See 1 Newberg on Class Actions*, §1:6, pp. 27-28. As a practical matter, a class action is the only economical and efficient method for addressing the Respondents' systematic failure to perform "made whole" determinations before reducing insurance benefits. *See Newberg, supra.* A class action is also the only "efficient remedy" for the many class members who will have claims for only a few thousand dollars or less and would otherwise go without any remedy. *Ferguson, supra* at ¶ 41.

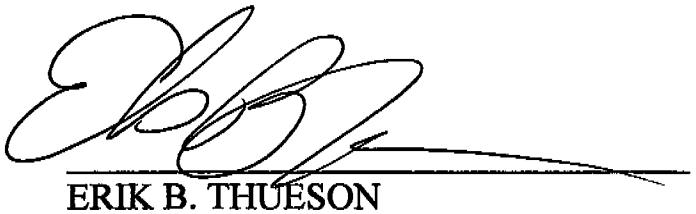
Class actions provide a means for enforcing the law under the private attorney general concept. *Newberg, supra.* Here, the State has testified it will continue to employ the same type of exclusion which this Court held violated the "made whole" laws in *State Auditor, supra.*

Finally, we submit that the District Court exceeded the limits of *Eisen, supra,* in addressing the merits. The legislature has prohibited both the State and private insurers from exercising subrogation unless their insureds have been fully compensated. Therefore, the State is not to be treated differently.

The case should be reversed and remanded on the issue of class certification. We ask the Court to so rule.

DATED this 12th day of April, 2010.

THUESON LAW OFFICE



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 (4)(d), MCA, I hereby certify that the foregoing document is double spaced, proportionately spaced, Times New Roman typeface, and 14 point size and less than 10,000 words.

DATED this 12th day of April, 2010.

THUESON LAW OFFICE

Celayne M. Simmons

CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing document upon counsel of record by the following means:

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